

New Sentencing Recommendations Aim for Fully Informed Decisions

By Michael A. Wolff¹

The Missouri Sentencing Advisory Commission has published a new set of Sentencing Recommendations designed to help judges and lawyers be fully informed in making sentencing decisions.

The new system of recommended sentences is designed to provide timely and useful information that will assist the courts and lawyers in fashioning sentences that are just, proportionate, and protective of victims and society. The recommendations are based upon actual sentence data of Missouri judges and the requirements of various sentencing laws. The new system uses a risk-of-re-offending scale similar to that used by the parole board.

“Judicial discretion is the cornerstone in sentencing in Missouri courts,” the sentencing commission’s recommendations notes. “Sentencing in Missouri is at its best when the decision makers have accurate and timely information about the offender, the offenses, and the options available for sentencing.”²

In describing the new system of recommended sentences, the commission abandons the phrase “sentencing guidelines” – in use in Missouri since 1998 – because the same phrase as used in the federal courts describes a mandatory scheme. Unlike the federal system, Missouri Sentencing Recommendations are voluntary.

Senate Bill 5 (2003) required appointment of a renewed sentencing advisory commission to produce a new system of recommended sentences, and studies of sentencing disparities, by June 30, 2004. The current commission released its Report containing the new system of recommended sentencing in June after several months of preparation, including meetings with groups of judges and lawyers around the state in May. The statute provides a one-year period for implementation, and for periodic revisions thereafter.

¹ Michael A. Wolff is a judge of the Missouri Supreme Court and Chair of the Missouri Sentencing Advisory Commission. The members of the Sentencing Advisory Commission are particularly grateful to David Oldfield of the Department of Corrections for his excellent analyses and drafting that were essential to the commission’s Report on Recommended Sentencing.

² Report on Recommended Sentencing, Missouri Sentencing Advisory Commission, June, 2004, p. 4. Available on the Missouri Judiciary Homepage, www.courts.mo.gov.

The commission has received funding for implementing its recommendations.

Four Simple Questions

The new system of Sentencing Recommendations is intended to address four simple questions that may arise in any sentencing decision:

1. What do judges do in similar cases?
2. What is the risk that this offender will re-offend?
3. What resources are available – in prison or in the community – to construct and impose a sentence that is right for this offender and for this crime?
4. What does a sentence really mean? If an offender is sentenced to a certain number of years in prison, how long can we expect that the offender will serve before being paroled?

To address the first question – what judges do in similar cases – the commission arranged Missouri crimes into five groups that have similar sentencing practices: violent crimes; sex crimes and child abuse; drugs; driving while intoxicated (DWI) felonies; and other nonviolent offenses.

In each of these five groups, some crimes are more severe than others. Within each group, offenses are in three levels -- Level I, most severe, to Level III, least severe within that group. The severity level for each crime is determined by the average prison sentence actually imposed for each offense or by the percent of offenders who receive prison terms. For example, second-degree murder is ranked as more severe than first-degree robbery simply on the basis that sentences are lengthier for one than the other.

As to each offense, the Recommended Sentences set forth three recommendations to choose from: a presumptive sentence, which applies where there are no aggravating or mitigating circumstances, and sentence recommendations where aggravating or mitigating circumstances are present.

Risk of Re-offending

Offenders are listed in five categories, depending on their risk of re-offending – Excellent (least risk) to Poor. This risk assessment is based upon the same risk-assessment system used by the Board of Probation and Parole in making decisions on paroling prisoners. The offender is assigned a numerical score based on 12 factors that include:

- prior criminal history – prior convictions; incarcerations; total incarceration time; years free of convictions; probation or parole revocations; and whether the offense is highly correlated to recidivism(burglary, auto theft, and tampering);
- Other risk variables – age; prior escape from custody; drug history; educational level; vocational readiness; and employment status.

These risk factors are statistically correlated with the likelihood that an offender will re-offend.

What Resources Available?

The third question that may arise in a sentencing decision is what resources are available. Missouri corrections officials over the years have developed a variety of programs in prisons and in the community. The non-prison sentences are available in various forms of probation, including community-based alcohol and drug treatment. More common are sentences under the 120-day sentencing provisions that may include drug or alcohol treatment, evaluation for sex offenders, and short-stay shock incarceration.

The sentencing commission adopted some new terminology to describe more accurately and coherently the various nonprison and 120-day sentences. Separation of the “probation” sentences into separate categories is driven by the fact that, in the past 10 years, probation in its various forms has increased 50 percent, and use of the 120-day or long term drug treatment programs is up 180 per cent.

The Sentencing Recommendations use the word “probation” to describe only the sentences that require an offender to check in periodically with the probation officer.

New Label: “Community Structured Sentence”

The phrase “Community Structured Sentence” (CSS) is used to indicate community-based sentences that may include intensive supervision, electronic monitoring, community-based drug or alcohol treatment, or other strategies that place fairly onerous requirements or restrictions on an offender serving a sentence in the community. Use of the term “Community Structured Sentence” is intended to convey the message that the sentence involves substantial restrictions on one’s freedom though the sentence is served in the community.

The next level of sentence is the “shock or treatment” (listed in the Recommendations as “Shk/Trt”) sentences under the 120-day statutes. These

include shock incarceration under section 559.115, and drug treatment provisions – including long-term drug treatment --under Sections 217.362, 217.364, and 217.378, RSMo.

The commission's Recommended Sentences are in the form of grids. The grid for violent class C felonies is shown in Figure 1. Following the grids, the commission's publication has the list of offenses ranked in order of severity. Each grid is also accompanied by a list of aggravating and mitigating factors that the judge can consider in determining what sentence to give for a particular offense. These factors take into account the particular circumstances of the crime and the effect on the victims.

The New PSI: The Sentencing Assessment Report

The Recommended Sentences will be included in a newly formatted pre-sentence investigation (PSI) provided to the sentencing court. The new PSI will be called a Sentencing Assessment Report; it will be much shorter than the current PSI format but will contain all the statutorily required information of a PSI. A sample of the new Sentencing Assessment Report is shown in Figure 2.

The Sentencing Assessment Report will include information on the offender, the offense, the risk factors, prior criminal history, and the circumstances of the crime, including aggravating and mitigating factors. The Report also will include the options for sentencing, including programs available in and out of the prison system, as appropriate, for the sentence.

The re-design and simplification of the PSI into the Sentencing Assessment Report is being done with cooperation of the Board of Probation and Parole and the probation staff that prepares PSI's.

The new Sentencing Assessment Report is a critical component of implementing the new system of Recommended Sentences. When the commission examined studies of Missouri's previous system of voluntary sentencing guidelines, we found that adherence to the guidelines was spotty. Information on the commission's sentences was included in a generic way on the front sheet of a PSI but there was no attempt to integrate the recommended sentence into the probation officer's report.

The new format – short and focussed on the essential information needed for sentencing – will be produced more quickly than the traditional PSI. While the new Sentence Assessment Report format has started to appear in place of the PSI, the probation staff is piloting a project in a few circuits to determine the feasibility

of presenting a Sentencing Assessment Report in every case within two weeks of a finding or plea of guilt.

While there are many instances where a PSI is not ordered, the department of corrections -- for its own purposes in supervising or incarcerating an offender -- nevertheless compiles the information that is contained in a Sentencing Assessment Report. The effort the department is making to produce a Sentencing Assessment Report in every case is simply to provide the lawyers and the sentencing judge the information as soon as practicable. The Report's sentencing recommendation will be the probation officer's interpretation of the Sentencing Advisory Commission Recommended Sentence.

What Does the Sentence Mean?

The final question we identified: if a person is sent to prison for a period of years, what does the sentence mean? The Sentencing Advisory Commission Report on Recommended Sentencing contains the Parole Board's guidelines for consideration for release on parole. These guidelines follow the risk categories that the Sentencing Advisory Commission has adopted in its sentencing recommendations. For example, if a class C violent offender, who is an average risk, is sentenced to four years (the presumptive sentence), the Parole Board's guidelines tell us that the offender can be expected to serve in the range of 19 to 24 months before being paroled. If the sentencing judge determines that there were aggravating circumstances, and gives a five-year term, the offender can be expected to serve 24 to 30 months before parole.

This feature of the sentencing commission's system of recommended sentences is intended to address the question that judges frequently ask about the length of time in prison. A note of caution: The parole board uses these as guidelines; in an individual case, there might be exceptions. The parole board also uses a few additional risk assessment factors than the 12 used for sentencing purposes; these added factors are related to an inmate's conduct and progress in prison. It is possible that an inmate's behavior may put him in a better or worse category of risk than the rating the inmate had at the time of sentencing. Neither the offender, the judge, nor the victims can take these parole board guidelines as a promise in an individual case. The effort we are making in the system of recommended sentencing is to provide information to those making sentencing decisions as to the probable consequences of their decisions. We would emphasize that a sentence should never be calculated based only on the average or expected parole date; the parole board's decisions are acts of discretion that deserve the same respect as the judges' acts of discretion in sentencing.

The Sentencing Assessment Report, where a prison term is recommended, will contain the parole board information. The report also will contain information where the sentence is subject to a mandatory minimum for time served, e.g., section 558.019.³

Comments Are Welcome

The Sentencing Advisory Commission's full report, including the new sentencing recommendations, is available on the Missouri judiciary homepage, www.courts.mo.gov. The commission hopes, during this implementation period, to establish a website that lawyers and judges can use, with relevant information about a particular offender, to determine the appropriate sentence and the available corrections resources.

The Sentencing Advisory Commission premised its efforts on the belief that Missouri judges and lawyers are smart and well motivated and that, given as much information as possible, will fashion and impose sentences that do justice.

The commission's efforts, we hope, will be viewed positively because they focus directly on providing information rather than dictating a standardized result for each case. No two cases are alike because no two offenders – and the circumstances of their crimes – are alike.

Justice is individual. Justice is achievable, particularly where the decision-makers are as fully informed as possible. We hope these efforts are helpful and

³ **558.019. RSMo. Minimum Prison Terms** for persons with prior prison commitments by the department of corrections [excluding regimented discipline (Section 217.378 RSMo.), 120-day programs (Section 559.115 RSMo.) or the long-term drug program (Section 217.362 RSMo.)] and serving a sentence other than in Chapter 195 RSMo. (drug offenses).

One prior commitment	40% of sentence (or until the age of 70 with 30% of the sentence served)
Two prior commitments	50% of sentence (or until the age of 70 with 40% of the sentence served)
Three or more prior commitments	80% of sentence (or until the age of 70 with 40% of the sentence served)
Guilty of a dangerous felony	85% of sentence

In addition, there are enhanced sentences and minimum prison terms for persistent predatory sexual offenders (Section 558.018 RSMo.), prior and persistent domestic violence offenders (Section 565.063 RSMo.) and prior and persistent drug offenders (Sections 195.285 to 195.296 RSMo.).

we welcome comments from the bar, the judiciary, and the public.

E-mail comments can be directed to the commission executive director, Kim.Green@courts.mo.gov or the commission chair, Michael.Wolff@courts.mo.gov. Regular mail can be addressed to the Missouri Sentencing Advisory Commission, P.O. 104480 Jefferson City, MO 65110.

End of Text – the captions for Figures 1 and 2 follow:

[FIGURE 1 IS THE GRID FOR CLASS C VIOLENT FELONIES THAT APPEARS ON PAGE 19 AT THE BOTTOM OF THE PAGE –

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Figure 1: Recommended Sentences for Violent Class C Felony Offenses

Felony Class		Offender Risk				
		Excellent	Above Average	Average	Below Average	Poor
<i>Data FY03</i>						
Class C	<i>Percent Prison Disposition</i>	23.8%	49.2%	64.3%	50.0%	50.0%
	<i>Ave. Prison Sentence</i>	5.3	5.0	6.6	5.8	5.8
	<i>1998 Recommended Prison Sentence</i>	2.5	4.5	6.5	8.5	8.5
Offense Severity	Level I					
	Mitigating	CSS	CSS	Shk/Trt	3	5
	Presumptive	Shk/Trt	Shk/Trt	4	5	7
	Aggravating	3	4	5	7	7
	Level II					
	Mitigating	Probation	CSS	CSS	Shk/Trt	4
	Presumptive	CSS	Shk/Trt	3	4	5
	Aggravating	Shk/Trt	3	4	5	7
	Level III					
	Mitigating	Probation	Probation	CSS	Shk/Trt	3
	Presumptive	Probation	CSS	Shk/Trt	3	4
	Aggravating	CSS	Shk/Trt	3	4	6

Figure 1 – Sentencing recommendations for Violent Class C Felonies. For each of the five groups of offenses, there is a grid of recommended sentences for each of three Levels of severity – Level I (most severe) to Level III (least severe) within that category. Shown above is the grid for violent Class C felonies. On the pages following the grid, there is a list of all Class C violent felonies ranked by order of severity. Also following each group of offenses is a list of aggravating and mitigating factors that can be considered in choosing the appropriate sentence. "CSS" stands for "Community Structured Sentence" a restrictive sentence served in the community; "Shk/Trt" refers to shock incarceration and treatment sentences available under the 120-day and related statutes.

Figure 2. Sentencing Assessment Report

Name: Smith, John Doe		SSN: XXX-XX-XXXX	
Date of Birth: 01/01/1984	Gender: Male	Race: White	
Offense: Burglary 2 nd Degree (attempt/conspiracy)		Class: C Felony (D felony)	
Judge/Division: XXXXXX, XXXXX XX		Docket Number: CRXXX-XXXX	
Defense Attorney: XXXXX, XXXX		Prosecuting Attorney: XXXXX, XXXX	

II. Risk Assessment Summary

A. Present Offense Information

Offense Summary: Mr. Smith unlawfully entered a residence that was unoccupied at the time. He stole approximately \$2,000 worth of property from the residence including a VCR, television and a .12 gauge shotgun. All the items were recovered except for the shotgun.

Offense Aggravating Factors: None.

Offense Mitigating Factors: Offender ensured that no one was present in the residence before he entered.
Co-Defendants: None.

B. Prior Criminal History (Findings of guilt, prior incarcerations and revocations of probation and parole)

Prior DOC History (Supervision and Incarceration): One prior Misdemeanor probation in Pettis County for stealing (8/15/00-8/14/02). One violation report was filed for use of illicit drugs (Marijuana), during the supervision term. The supervision period was successfully completed.

C. Victim Impact (Victim address and contact information available through Prosecuting Attorney)

Victim Name(s): XXXXXX, XXXXX	Does Victim Want to Testify at Sentencing?: No
Victim Impact: Mr. XXXXXX wants the offender to pay the replacement cost for the .12 gauge shotgun. He places the value on this item at \$400. The victim reports no psychological, physical, or mental harm or injury from the offense.	

D. Offender Asset and Liability Assessment (including the Offender Risk Assessment)

Scoring Risk Assets: Mr. Smith has stable employment, no prior incarceration and no revocation of supervision
Scoring Risk Liabilities: Mr. Smith is a youthful offender with a current substance abuse problem (Alcohol), he has no high school degree or GED and he has one prior conviction. The offense is a high recidivist offense.
Non Risk Scoring Factors: Mr. Smith lives with his parents, has family support and good mental and physical health. His financial condition is poor. The weapon that was stolen was sold to buy illegal drugs (Marijuana). No history of assaultive behavior. The offender admits to a current substance abuse problem and while previously under supervision Mr. Smith successfully completed outpatient substance abuse counseling.

III. Offender Management Plan

Supervision Plan: The primary component of either an institutional or community placement is the need to reduce Mr. Smith's risk level by addressing his substance abuse problem through assessment and appropriate treatment placement. A secondary component is the need to restore the victim.
Available Strategies
Community: 1. Probation supervision with community treatment. 2. Probation supervision with electronic monitoring.
Institution: 1. Institution Treatment Center. 2. Incarceration. The offender will be managed on Enhanced Supervision

IV. Conclusion

Risk Score: -1 Offender Risk Level: Average Seriousness of Offense: Non Violent, Level I Offense Circumstances : Mitigating		
Sentencing Commission Standards: Community Structured Supervision		
Parole Release Standards: Min: 15% Standard: 20% Max: 25%. Ave. percent time served in FY03 with Average Risk: 33%		
Sentence Recommendation: Probation with 1) Intensive Supervision 2) Intensive Outpatient Substance Abuse Treatment 3) \$400 Restitution at the rate of \$100 per month 4) 20 hours Community Service within 60 days		
Officer Name: Johnston, J. Scott	Phone Number: 660/530-5530	Date: 1/27/2004

Figure 2 – Sentencing Assessment Report. This is a sample of the new format for the pre-sentence investigation (PSI), now called the "Sentencing Assessment Report."

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